

[NOT FOR PUBLICATION]

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

In re

) Case No. LA 05-38663-ER

) Chapter 11

NAHAPET TIMIRYAN,

) **MEMORANDUM OF DECISION**

) Date: May 17, 2006

) Time: 10:00 a.m.

Debtor.

) Place: Courtroom 1568
255 East Temple St.
Los Angeles, CA

On May 17, 2006, the Court held a hearing on the Debtor In Possession's ("Debtor") Motion for Turnover of Property of the Estate ("Motion"). Appearances were as set forth on the record. The Court denied turnover and entered an order on June 1, 2006. The Court reserved the right to issue this Memorandum of Decision explaining its decision.

I
FACTUAL BACKGROUND

Debtor filed for chapter 11 relief on October 6, 2006. He was in the mobile medical diagnostic industry through his corporate entities. Specifically, "Debtor's corporations owned medical diagnostic equipment, which was placed at various medical offices to assist the respective practitioners in conducting tests for their patients." Motion at 2. In 2004, the Federal Bureau of Investigation ("FBI") began investigating the billing practices of certain medical offices. Debtor was part of the investigation since his diagnostic equipment was located at these offices.

On December 17, 2005,¹ the FBI seized vehicles belonging to the Debtor with a value of approximately \$89,973.27 ("Seized Vehicles") and funds in an escrow account in the amount of \$427,807.81², in which Debtor had a 50% interest ("Seized Funds" and collectively "Seized Assets").

Despite numerous requests for return of the Seized Assets, the FBI has refused to return them. Debtor intends to use the Seized Assets to fund a plan. Based on the claims filed in this

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This date appears to be a typographical error in the Motion. According to the Government's Opposition to Motion ("Opposition"), the seizure took place in December of 2004, not 2005.

²These funds were the proceeds from a sale of real property. Motion at 5. The Government further clarifies that the proceeds were from the sale of real property located at 3138 and 3138 A, B and C Montrose Ave., Glendale, CA and 4037 Liberty Ave., Glendale, CA. Opposition at 2-3.

1 case, Debtor anticipates that the Seized Assets will result in a
2 100% payment to creditors.

3 Debtor currently seeks turnover of the Seized Assets on the
4 grounds that they are property of the estate, and relies on the
5 Supreme Court's decision in United States v. Whiting Pools, 462
6 U.S. 198, 205 (1983) that 'given the broad scope of the
7 reorganization estate, property of the debtor repossessed by a
8 secured creditor falls within this rule, and therefore may be
9 drawn into the estate.' Id. at 205-06." Motion at 6. Debtor
10 further asserts that "until title to property is adjudicated in
11 the government by judicial decree, the property is not owned by
12 the government." Motion at 6, citing United States v. 92 Buena
13 Vista Ave., 507 U.S. 111, 126 (1993).

15 Since the Seized Assets are property of the estate, Debtor
16 contends that they must be turned over pursuant to § 542. "As
17 the Supreme Court held in Whiting Pools, this Court may order the
18 government agency to turn over property of the estate to the
19 Debtor. The language of Section 542 is mandatory and not
20 discretionary." Motion at 7.

21 Debtor finally argues that equity requires turnover of the
22 Seized Assets pursuant to § 105(a). No finding of wrongdoing on
23 Debtor's part has been made. Debtor seeks return of the Seized
24 Assets to ensure distributions to his creditors. If they are not
25 returned, "it is likely that the creditors will not receive any
26 distribution and this case may have to be converted to a Chapter
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1 7." Motion at 8.³

2 In opposition, the United States of America (the
3 "Government") provides that the seizure at issue occurred in
4 connection with the FBI investigation of Medical Echodiagnostic
5 ("Echodiagnostic"), Medical Sonodiagnostic ("Sonodiagnostic") and
6 other independent diagnostic testing facilities ("IDTF"). "The
7 IDTFs are suspected of submitting false claims to Medicare for
8 services never provided . . . and fraudulently receiving millions
9 of dollars from Medicare." Opposition at 2. The Government
10 believes that Debtor owned Echodiagnostic and his wife, Angela
11 Timiryan, owned Sonodiagnostic. Declaration of Pio S. Kim in
12 Support of Opposition ("Kim Declaration") at ¶ 3.

13
14 In 2004, the FBI search of the IDTFs made Debtor aware of
15 the investigation. "In October 2004, the Debtor placed the real
16 properties located at 3138 and 3138 A, B and C Montrose Avenue,
17 Glendale, California and 4037 Liberty Avenue, Glendale,

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20 Debtor lists other personal hardships suffered as a result
21 of the seizure by the FBI at page 8 of the Motion. However,
22 these personal hardships are not directly relevant to the
turnover issue and will not be addressed herein.

23 On May 10, 2006, creditor, Siemens Financial Services
24 ("Siemens"), filed a Joinder to the Motion ("Joinder"). Siemens
25 "understands that the primary, if not sole, source of recovery
26 for creditors is the funds in question. The purpose of
27 bankruptcy is to protect creditors. Siemens believes that the
28 scope and purpose of the Bankruptcy Code can be carried out if a
portion of the seized funds are turned over for distribution to
creditors. Once the creditor obligations are satisfied, the
government and/or the Bankruptcy Court may take appropriate
action with respect to any surplus for the Debtor." Joinder at
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1 California on the market for sale. In December 2004, upon sale
2 of the real properties, the FBI seized the funds in the escrow
3 accounts opened for their sale. The FBI also seized funds from
4 the Debtor's personal accounts and two vehicles. A portion of
5 the seized funds and the vehicles constitute the Subject Assets."
6 Opposition at 2-3 (citations omitted); Kim Declaration at ¶¶ 4-6.
7 The seizures were pursuant to seizure warrants. The District
8 Court "found that there was probable cause to believe that the
9 assets were subject to seizure and forfeiture because they
10 constituted or were traceable to the proceeds of the health care
11 fraud and/or constituted property involved in illegal money
12 laundering of the proceeds or were traceable to such property."
13 Opposition at 3; Kim Declaration at ¶ 7.

15 The FBI's investigation is not complete and Debtor has not
16 been indicted on any criminal forfeiture count(s") with respect
17 to the Seized Assets. "The government has been prevented from
18 filing a civil forfeiture complaint against the [Seized Assets]
19 because of the danger that such a complaint would reveal
20 sensitive or confidential information about the investigation and
21 jeopardize the same." Opposition at 3 (citation and footnote
22 omitted).

24 The Government further contends that the cases cited by
25 Debtor do not involve forfeiture seizures and are easily
26 distinguishable. "Whiting Pools concerned a seizure by the
27 Internal Revenue Service for unpaid tax, and In re National Safe
28 Center, Inc. [41 B.R. 195 (Bankr. HI 1984)] involved a seizure by

1 the United States Customs Service for nonpayment of duties and
2 other charges. Unlike the seizure in the present action, the
3 seizures in these two cases resulted from the exercise of
4 administrative powers by federal agencies in the absence of any
5 judicial finding of probable cause or issuance of seizure
6 warrants. In other words, the agencies did not take possession
7 of the assets for forfeiture to the government, but merely acted
8 as a creditor collecting on debts." Opposition at 8.

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10 The Government asserts that the District Court's decision in
11 In re Thena, 190 B.R. 407, 412 (D. Ore. 1995) is more helpful
12 than the foregoing cases. In Thena, the government seized
13 certain assets on the grounds that they were involved in money
14 laundering. The debtor therein filed for chapter 11 relief prior
15 to the issuance of any indictment. The Thena court reasoned that
16 at the time of filing, debtor held legal title to the assets at
17 issue, but could not direct their use. Consequently, the
18 "authority to 'use, sell, or lease' the seized property,
19 therefore, is not includable as property of the estate under 11
20 U.S.C. sections 363 or 541. . . ." Thena, 190 B.R. at 412. Based
21 on the foregoing, the Government asserts that the Seized Assets
22 are not subject to forfeiture.⁴

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24 Debtor believes that this case is distinguishable from

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26 The Government also argues that the automatic stay is not
27 applicable herein under 11 U.S.C. § 362(b)(4). This argument
28 will not be addressed herein, since the Court is deciding the
Motion based on the nature of the Seized Assets.

1 Thena. Specifically, Debtor argues that in Thena, "seizure was
2 made for a violent crime and the debtor in that case immediately
3 filed bankruptcy for the purpose of obtaining a turnover. Unlike
4 [Thena], here, the seizure occurred in December of 2004. The
5 Debtor waited almost one year and, as a result of other
6 financial/creditor pressure, commenced the instant case. . . .
7 Debtor did not immediately seek turnover of the Seized Assets.
8 Instead, the Debtor sought a bar date and served all creditors,
9 including the Government, with the bar date notice." Reply to
10 Opposition ("Reply") at 6.

11 12 II 13 DISCUSSION

14 In deciding whether turnover is appropriate herein, the real
15 issue before the Court is whether the provisions of the
16 Bankruptcy Code should trump the federal forfeiture statutes or
17 vice versa. Debtor's main argument is that the Seized Assets are
18 property of the estate. Technically, Debtor appears correct.
19 There has been no adjudication of the forfeiture issue. In fact,
20 no civil or criminal forfeiture proceedings have even been
21 commenced against Debtor. Consequently, the Seized Assets appear
22 to be property of the estate subject to turnover under section
23 542(a). See 92 Buena Vista Avenue, 507 U.S. at 127.

24 However, while the Government does not dispute that Debtor
25 has an interest in the Seized Assets, its position is that the
26 estate does not own 100% of this interest. Specifically, the
27 Government relies on Thena, which analogizes this situation to
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1 that of a trust. A debtor may own legal title to a trust, but
2 have no beneficial interest in it.

3 Thus, . . . the property of the estate includes the
4 legal title, but not the beneficial interest in the
5 property. . . . In short, Chapter 11 does not permit
6 the estate's inclusion of property which did not exist,
7 at the time of filing, for the debtor's beneficial,
equitable use. Again, Congress promulgated Chapter 11
to protect, rather than enhance, the debtor's estate.
8 Thena, 190 B.R. at 412.

9 In the case of forfeiture, if property is seized
10 prepetition, a debtor has no "equitable right to direct the
11 seized property for the debtor's benefit. . . . The authority to
12 'use, sell, or lease' the seized property, therefore, is not
13 includable in property of the estate under 11 U.S.C. sections 363
14 or 541," Id. Consequently, the Thena court concludes
15 that the seized property is not subject to turnover.

16 Debtor argues that Thena is distinguishable factually in
17 that: (i) the debtor in that case filed bankruptcy within two
18 months of the seizure; and (ii) a violent crime prompted the
19 forfeiture proceedings. Debtor attempts to make himself appear
20 more "innocent," because he filed bankruptcy more than a year
21 after the seizure, and had to file due to financial hardships
22 caused by the seizure. However, a debtor's motive for filing
23 bankruptcy does not appear to expressly weigh into the Thena
24 court's reasoning as demonstrated above.

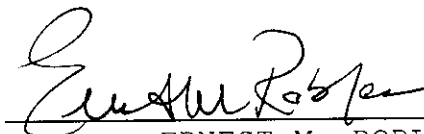
25 While Thena is not binding on this Court, it appears to be
26 well reasoned and allows the Court to prevent a potential
27 bankruptcy abuse. Specifically, if the Court were to hold
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1 otherwise, entities subject to forfeiture proceedings could
2 "undo" any prepetition seizures by filing bankruptcy and seeking
3 turnover. In addition, unlike the IRS in Whiting Pools, which
4 had a lien on the levied property therein, the Government would
5 appear to be left with a fourth priority distribution claim under
6 11 U.S.C. § 726(a)(4), and would arguably be worse off than a
7 general unsecured creditor. See Whiting Pools, 462 U.S. at 207
8 ("The Bankruptcy Code provides secured creditors various rights,
9 including the right to adequate protection, and these rights
10 replace the protection afforded by possession."). In sum,
11 holding otherwise could potentially render the federal forfeiture
12 statutes meaningless.
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14 **III**
15 **CONCLUSION**

16 Based on the foregoing, the Motion is denied based on Thena.
17 While the estate may hold legal title to the Seized Assets, it
18 does not possess the authority to use, sell or lease them.
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20 DATED: March 26, 2007
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25 ERNEST M. ROBLES
26 United States Bankruptcy Judge
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CERTIFICATE OF SERVICE

I, Gabriela Huerta, hereby certify that on
3/20/07 13/27/07, I sent by regular mail a
true copy of the Memorandum of Decision on the parties at the
addresses listed below:

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